IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 262 of 1996.

Judgement reserved on: 5.10.2007.

Date of decision: 15.11.2007

The Cantonment Board, Jutogh ….. Appellant.

Vs.

Earnest Dean (since dead) and ors. …. Respondents.

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : Mr. L.C.Sood, Advocate.

For the Respondent : Mr. R.K.Bawa, Sr. Advocate with Mr. Inderjit Narwal, Advocate, for respondents No. 2 to 4.

Kuldip Singh, Judge.

This appeal has been filed by Cantonment Board, Jutogh, Shimla-9 (for short, Board) against the judgement, decree dated 22.2.1996 passed by learned Additional District Judge, Shimla in Civil Appeal No. 31-S/13 of 1992, decreeing the suit for declaration and injunction filed by Smt. Mabul H. Dean, predecessor of respondents.

2. The facts in brief are that H.C.Dean husband of Smt. Mabul H.Dean purchased property known as Survey No. 52, situate in Jutogh Cantt. Shimla-9 through registered sale deed, dated 30.12.1972. H.C. Dean died and he was succeeded by Smt. Mabul

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Whether the reporters of the local papers may be allowed to see the Judgment?

H. Dean his wife. There were some Dharas/ out houses in dilapidated condition on Survey No. 52 when the property was purchased by H.C. Dean. Smt. Mabul H. Dean submitted an application to the Board for permission to repair the out houses. She was informed by the Board on 1.8.1988 to apply on proper format, she applied accordingly and fulfilled the requirements of Section 179 of the Cantonment Act, 1924 (for short, the Act).

3. Smt. Mabul H. Dean sent a reminder dated 10.9.1988 to the Board to grant permission to repair the out houses but Board did not give any reply. On 19.9.1988, the Board sent a notice to Smt. Mabul H. Dean, under Section 179 of the Act and raised certain technical objections. She again submitted plans after removing all objections raised by the Board. The Board again maintained silence and did not care to grant or refuse the permission for repairing the out houses. She again on 28.3.1989 submitted an application/ reminder to Board to grant permission. She ultimately got issued notice dated 6.6.1989 through her Advocate calling upon the Board to grant permission within fifteen days for repairing the out houses, but Board did not take steps to grant permission. The condition of the out houses was very bad, therefore, Smt. Mabul H. Dean repaired the out houses in anticipation of the permission of the Board. The Board on 4.4.1990 issued notice to Smt. Mabul H. Dean asking her to demolish/ remove the construction within 20 days of the receipt of the notice. This notice was challenged by Smt. Mabul H. Dean on the grounds that the notice is against the Act and Bye-laws. She has submitted that she applied for grant of permission under Section 179

on 20.7.1988. She has claimed deemed sanction under Section 181 of the Act. The Board has not given any reasons for issuing the demolition order, nor the plan for repairing the out houses has been rejected. In these circumstances, Smt. Mabul H. Dean filed the suit declaring resolution dated 26.3.1990 and notice dated 4.4.1990 illegal and nullity and to declare that she had deemed sanction to repair the out houses. She has also prayed for prohibitory injunction against the Board from demolishing out houses situate on Survey No. 52.

4. The suit has been contested by the Board by filing written statement, in which preliminary objections have been taken that suit is bad for want of notice, no appeal has been filed against the order of the Board and therefore, the suit is not maintainable, the pleas of estoppel and alternative efficacious remedy have also been taken. On merits, it has been admitted that Survey No. 52 was purchased by H. C. Dean. The application and plans of Smt. Mabul H. Dean were returned on 19.9.1988. She failed to get the mutation effected in her name. Notice sent by Smt. Mabul H. Dean through her counsel to the Board was admitted. No permission was granted to Smt. Mabul H. Dean for repairing the out houses. The jurisdiction of the court was admitted.

5. The learned Sub Judge Ist Class (IV), Shimla held that there was no deemed sanction for repairing the out houses under the Act and dismissed the suit on 27.3.1992. Smt. Mabul H. Dean filed the appeal and during the pendency of the appeal Smt. Mabul died and her four legal representatives were brought on record and

learned Additional District Judge allowed the appeal on 22.2.1996. The Board is thus in second appeal.

6. The appeal has been admitted on following substantial questions of law:-

1. In a case governed by Cantonment Act, 1924, which is a special Act and is a complete Code in itself providing an elaborate mechanism for respving (sic) matters arising in Cantonments, does a civil suit lie without exhausting the channel of Appeal and Revision provided under the Act ibid?

2. Whether on dismissal of a civil suit in the said situation which is specifically barred under S. 272 of Cantonment Act, 1924 for not availing the remedy of Appeal provided under Section 274 of the Cantonment Act read with S. 278 which is final subject to provisions of Section 277 of the said Act, can an appeal be entertained by the District Judge and to what extent the decision rendered in that appeal will be binding on the parties?

7. I have heard the learned counsel for the parties and gone through the record. Mr. L.C. Sood, Advocate appearing on behalf of the appellant- Board has submitted that civil suit is not maintainable without exhausting the channel of appeal and revision under the Act. He has also submitted that once the civil suit was dismissed, the lower appellate court could not have entertained the appeal. Sh. R.K. Bawa, learned Senior Advocate has supported the impugned judgement and decree. He has also submitted that respondent No. 1 Earnest Dean has died on 27.1.1998 and his legal

representatives were not brought on record, therefore, appeal as a whole has abated.

Substantial questions of law No. 1 & 2.

8. The substantial questions of law No.1 and 2 are interconnected and based upon interpretation of some of the provisions of the Act, therefore, both the substantial questions of law are being disposed of collectively.

9. The learned Additional District Judge in the impugned judgement has held that plaintiff was well within her right in carrying out the reconstruction. The construction of the plaintiff cannot be considered unauthorized. The Board was clear in error in ordering its demolition, both the points formulated by the Additional District Judge in the impugned judgement were answered in favour of the plaintiff.

10. The learned counsel for the Board has submitted that suit filed by the plaintiff was not maintainable and for that purpose, he has relied Sections 272, 274, 277 and 278 of the Act. As per Section 274 an appeal is available to an aggrieved person against an order described in 3rd column of Schedule-V. The Board vide resolution No. 28 dated 26.3.1990 Ex. DW 1/D rejected the building plan of Smt. Mabul H. Dean and further resolved to issue notice under Section 185 of the Act for demolition of fresh unauthorized construction. In the resolution dated 26.3.1990 `fresh unauthorized construction' has not been specified nor identified. The Executive Officer of the Board vide notice dated 4.4.1990 Ex. DW 1/C has given details of construction allegedly raised in contravention of Section 184

of the Act, but this unauthorized construction has not been specified in resolution No. 28 Ex. DW 1/D. In Ex. DW 1/C it has been alleged that construction has been raised in contravention of Section 184 of the Act, but contravention of Section 184 of the Act is not appealable under Section 274 of the Act. Section 277 is of revision and Section 278 gives finality to appellate orders. Section 272 gives protection to the Board and Executive Officer against suit or prosecution. This Section is also not applicable in the present case. From the Act, it has not been pointed out that the jurisdiction of the civil court to entertain the suit of the nature filed by the plaintiff is barred under the Act.

11. Mr. L.C. Sood, Advocate has relied **Rahas Bihari Lal vs. Municipal Board, Cawnpore** [AIR 1916 All. 361] and **Cantonment Board Kamptee and others vs. Burjorjee Dada Bhoy Zal** [AIR 1955 Nagpur 81] for the proposition that once a special provision is provided under the statute then the remedy is by way of an appeal and not by way of civil suit. The Board has not disputed the jurisdiction of the civil court to try the suit, rather in para-11 of the written statement, the Board has admitted the jurisdiction of the court to try the suit. Moreover, it has come on record that notice Ex. DW 1/C is not in conformity with resolution Ex. DW 1/D. The Executive Officer of the Board of his own gave details of alleged unauthorized construction raised by the predecessor of the respondents in Ex. DW 1/C even though, no such details are mentioned in the resolution Ex. DW 1/D nor such construction has been identified in the said resolution. The Executive Officer has

usurped the power which was not vested in him in issuing notice Ex. DW 1/C while identifying the alleged unauthorized construction. The notice Ex. DW 1/C is thus without jurisdiction. The resolution Ex. DW 1/D is also vague in absence of identification of alleged unauthorized construction raised by the predecessor of the respondents on property Survey No. 52. Therefore, in the facts and circumstance of the case, **Rahas Bihari Lal vs. Municipal Board, Cawnpore** and **Cantonment Board Kamptee and others vs. Burjorjee Dada Bhoy** (supra) relied by Mr. L.C. Sood, Advocate, are not applicable in the present case. It is too late for the Board to question the jurisdiction of civil court in the present case.

12. The civil court under Section 9 CPC has the jurisdiction to try all suits of civil nature except the suit of which cognizance is either expressly or impliedly barred. The exclusion of civil court jurisdiction is not to be easily inferred. In **Dhulabhai etc. vs. State of Madhya Pradesh and another** [AIR 1969 SC 78], the Hon'ble Supreme Court in para- 32 of the judgement, has held as follows:-

> "(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
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> (2) Whether there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency

of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply."

13. In **State of Andhra Pradesh vs. Manjeti Laxmi Kantha Rao (D) by L.Rs. and others** [AIR 2000 SC 2220], the Hon'ble Supreme Court, in para-5 of the judgement, has held as follows:-

"The normal rule of law is that civil Courts have jurisdiction to try all suits of civil nature except those of which cognizance by them is either expressly or impliedly excluded as provided under Section 9 of the Code of Civil Procedure but such exclusion is not readily inferred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of the Civil Courts to try civil suit. The test adopted in examining such a question is (i) whether the legislature intent to exclude arises explicitly or by necessary implication, and (ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it. In Dhulabhai v. State of Madhya Pradesh, (1968) 3 SCR 662 : (AIR 1969 SC 78), it was noticed that where a statute gives finality to the orders of the special Tribunals jurisdiction of the civil Courts must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit and such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure."

14. In the present case, in para-11 of the plaint, jurisdiction of the court to try the suit has been pleaded. The Board did not

dispute the jurisdiction of the court to try the suit. The Board in reply to para-11 of the plaint in corresponding para-11 of the written statement has admitted jurisdiction of the court to try the suit. Once the Board itself has admitted the jurisdiction of the court to try the suit, then in second appeal, the Board cannot be heard to say that civil court has no jurisdiction to try the suit. The predecessor of the appellants has filed the suit for declaration and injunction. The appellate authority under Sections 274 to 278 of the Act has no power to grant the reliefs prayed by the predecessor of the appellants in the suit. Therefore, on this ground also the civil court has jurisdiction to try the suit of the nature filed by the predecessor of the appellants. The learned Additional District Judge has rightly appreciated the material on record, no case for interference has been made out. In the facts and circumstances of the case, the civil court has the jurisdiction to try the suit and suit is maintainable. The substantial questions of law No. 1 and 2 are decided against the appellant and in favour of the respondents.

15. The learned counsel for the respondents has submitted that the appeal has abated as respondent No. 1 Earnest Dean has died on 27.1.1998 and his legal representatives have not been brought on record. The appeal has been decided on merits, therefore, I do not propose to decide this point in the present appeal.

16. No other point was urged.

17. The result of the above discussion, the appeal fails and is accordingly dismissed. No costs.

November 15, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**